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TABLE OF CASES CITED.

Supreme Court of the United States

JOHN F. STEELE, Plaintiff-in-Error, vs. THE UNITED STATES OF AMERICA, Defendant-in-Error,	Cause No. 636 OCTOBER TERM 1924.
JOHN F. STEELE, Appellant. vs. THE UNITED STATES OF AMERICA, Defendant-in-Error,	Cause No. 235 OCTOBER TERM 1924.

BRIEF FOR APPELLANT AND PLAINTIFF-IN-ERROR.

The above-entitled causes were advanced and consolidated upon application of the appellant and plaintiff-in-error, John F. Steele.

Cause No. 235 involves an appeal to this Court from a judgment or decree of the United States District Court for the Southern District of New York, signed by Honorable Francis A. Winslow, District Judge, denying the petition of John F. Steele to vacate and set aside a search warrant and restore the property seized thereunder, and directing the same to remain in the custody of the officer by whom the same were seized or to be otherwise disposed

of according to law (p. 3). The appeal is based upon assignments of error in which, among other things, it is charged that the search warrant described in the judgment or decree was obtained in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

Cause No. 636 involves a writ of error, sued out by the said Steele (p. 1) upon his conviction for the violation of Title II of the National Prohibition Act, upon an information charging him with having unlawfully, wilfully and knowingly possessed, in the garage at 611 West 46th Street, intoxicating liquor (pp. 1, 2). The assignments of error upon which the writ was obtained also charged, among other things, a violation of the constitutional rights of the said Steele in respect to the Fourth and Fifth Amendments and also assigned other grounds of error which will be referred to below.

The appeal and writ of error is taken direct to this Court, under the provisions of Section 238 of the Judicial Code, on the ground that these causes involve the construction or application of the Constitution of the United States. We take it that once this Court acquires jurisdiction, it has the power to decide every other question arising in the case (*Pierce* v. *U. S.*, 252 U. S. 239). For these reasons, there will be also brought up for review in this Court other questions, including those involving construction and interpretation of the provisions of the National Prohibition Act and the Espionage Act relating to searches and seizures.

Statement of the Case.

THE FACTS OF CAUSE NO. 235.

The facts are, as they were developed in case No. 235, briefly as follows: On December 6, 1922, one Isidor Einstein laid before Samuel M. Hitchcock, United States Commissioner for the Southern District of New York, an affidavit which reads as follows:

"SOUTHERN DISTRICT OF NEW YORK, ss.:

ISIDOR EINSTEIN, being duly sworn, deposes and says: I am a General Prohibition Agent assigned to duty in the State of New York. On December 6, 1922, at about 10 o'clock A. M., accompanied by Agent Moe W. Smith, I was standing in front of the garage located in the building at 611 West 46th Street, Borough of Manhattan, City and Southern District of New York. This building is used for business purposes only. I saw a small truck driven into the entrance of the garage and I saw the driver unload from the end of the truck a number of cases stencilled whiskey. They were the size and appearance of whiskey cases and I believe that they contained whiskey.

A search of the records of the Federal Prohibition Director's office fails to disclose any permit for the manufacture, sale or possession of intoxicating liquors at the premises above referred to.

The said premises are within the Southern District of New York and, upon information and belief, have thereon a quantity of intoxicating liquor containing more than one-half of one per cent. of alcohol by volume, and fit for use for beverage purposes, which

is used, has been used and is intended for use in violation of the Statute of the United States, to wit, the National Prohibition Act.

This affidavit is made to procure a search warrant, to search said building at the above address, any building or rooms connected or used in connection with said garage, the basement or sub-cellar beneath the same, and to seize all intoxicating liquors found thereon.

ISIDOR EINSTEIN."

On the same day, upon this affidavit, the United States Commissioner issued a search warrant which reads as follows:

"The President of the United States of America to Isidor Einstein, General Prohibition Agent:

Whereas, It appears from the affidavit of said Isidor Einstein that certain intoxicating liquor containing more than ½ of 1% of alcohol by volume and fit for use for beverage purposes is unlawfully held and possessed in a certain garage located in the four-story building at 611 West 46th Street, Borough of Manhattan, City and Southern District of New York, said building being used for business purposes only—and in any safe or desk, store room, container, receptacle, basement or sub-cellar, building, room or rooms connected or used in connection with said garage; and that said liquor is used and is intended for use and has been used in violation of Title II of the National Prohibition Act in that said liquor was and is wilfully, knowingly and unlawfully held in said premises.

Now, Therefore, you are hereby commanded in the name of the President of the United States, in the day time only, to enter the said premises, and then and there to

search diligently for said liquor, and if the same or any part thereof shall be found on said premises, then you are hereby authorized and commanded to seize and secure the same and to make a return of your doings to the undersigned within ten days from the date hereof.

You are likewise commanded in the event you seize or take said liquor under the warrant to give a copy of this warrant together with a receipt for the liquor taken (specifying it in detail), to the person from whom it is taken by you, or in whose possession it is found, or in the absence of any person to leave a copy of this warrant, with the receipt as aforesaid, in the place where said liquor is found.

Immediately upon execution of this warrant you are commanded further to forthwith return the warrant to the undersigned, and to deliver to him a written inventory of the liquor taken, duly made and verified by you.

Given under my hand and seal this 6th day of December, 1922.

SAMUEL M. HITCHCOCK,
United States Commissioner for the
Southern District of New York."

The warrant was returned to the United States Commissioner bearing the following endorsement:

"New York, Dec. 6, 1922. 150 cases whiskey, 92 bags of whiskey, 1 5 gallon can of alcohol, 6 5 gallon jugs of whiskey, 33 cases of gin, 102 quarts whiskey, 2 50 gallon barrels of whiskey, 1 corking machine.

ISIDOR EINSTEIN,
General Agents."

This endorsement was presumably intended to comply with the requirement of the statute with respect to the return necessary by the officer executing the same.

After the warrant, bearing this endorsement, was returned to the United States Commissioner, an affidavit was filed by Steele in which he claimed the warrant directed the search to be made of a certain garage in the four-story building at 611 West 46th Street, New York City; that the intoxicating liquor which was seized was seized in 609 West 46th Street, New York City, which is a separate and distinct building from the one described in the warrant, to wit, 611 West 46th Street, New York City; that the buildings were separated by a common party wall; that the lower portion of the building was used as a garage and part of the upper floors were used for storage (No. 235, fol. 18); that he himself resided in part of the building at 609 West 46th Street; that his right to the liquor complained of was legal because possessed in a private dwelling.

Upon the filing of this affidavit, a hearing was had before the United States Commissioner, in which the relator moved to vacate and quash the warrant on the grounds that the same failed to comply with the provisions of the Espionage Act and that the search was clearly in violation of his constitutional rights (see argument of counsel, fols. 23-30, pp. 10-13, No. 235).

Upon the denial of petitioner's motion testimony was taken by the Commissioner. Einstein, who secured the warrant, testified, in effect, that on December 6th he went to premises 609 West 46th Street with one Moe Smith; that the building

had the appearance of a garage. He faced the entrance and saw a small truck drive in and a man unknown to him step off; that he saw a number of cases being unloaded; that he was at a distance of about 25 or 30 feet away (fol. 32); that the cases were marked whiskey (fol. 33); that he went to the Prohibition Office to determine whether a permit existed for the premises; that he found none (fol. 33); that he thereafter applied to the United States Commissioner for a search warrant, which was secured; that he thereupon returned to the premises and went to the place where the liquor was unloaded, on the street floor, *and found nothing.* He went up on the elevator two floors and saw two or three men filling up bottles of whiskey and "bagging the same" (fols. 37, 38); that he found 92 bags, 150 cases in a room on that floor; that Steele thereafter appeared on the scene and he served a copy of the warrant on him (fol. 43). On cross-examination he admitted that he had *never been in the building before obtaining a warrant or search thereunder* (fol. 49) and had no personal knowledge of the nature of the use or occupancy of the building with the exception of the ground floor, in which he saw the vehicle enter.

Moe Smith, who assisted him in the search, testified that he observed a small motor truck enter the garage; that he did not have the building under observation all the time he was there (fol. 70), but when Einstein returned with a warrant they, together, entered the premises. He testified that when he entered the premises he was confronted by another man name Smith who claimed to be a caretaker; that despite Smith's objection, he insisted upon searching the entire building; that on the

first floor *he found nothing at all.* He then asked Smith to take him up in the elevator to the rear of the building and on the second floor and testified "we got off and there is an opening which led into another part where there was three men who were filling bottles of amber colored fluid from filters and jugs. These men were in an enclosure. I should guess the enclosure was about twenty-five feet, partitioned off in this here building, and this was on the 611 side." There he found a corking and whiskey bottling machine and other quantities of whiskey and liquor (fol. 72). On the floor above he found 92 bags of whiskey and 150 cases (fol. 73). On cross-examination he admitted that he *had not seen any boxes with any whiskey stencil marks;* that he was not with Agent Einstein, who claims to have seen it (fol. 77); that he had never been inside the building—did not know what the building contained—prior to the search, with the exception of the ground floor which he had peered into from the street (fol. 77); that the house had two numbers, 609 and 611 (fol. 76); that prior to the search he did not know whether it was one or two buildings, although the garage was one large floor without any partitions and was contained in both parts of the building which was known as 609-611 (fol. 77). He admitted that the building *contained living rooms on the side known as 609, which is the side on which the whiskey was found. He admitted that the second floor of the premises was not used as a garage but as a storage room* (fol. 83).

After the testimony of these agents was given appellant moved to vacate the search warrant on the ground that it affirmatively appeared that the

agents not only searched the garage but other floors in the building; that there was no proof before the Commissioner at the time the warrant was issued to show that the upper floors had any connection with the garage and, as a matter of fact, it appeared affirmatively that such upper floors, in which the liquor was found, were not used as a garage at all (fol. 88).

The appellant testified that he resided in the premises, had his meals there; that 609 and *611 were two separate buildings.* The lower floor, however, was not divided, although there were pillars, in lieu of partition walls, on the ground floor; that the upper stories of the building were used by various tenants; that a portion of the premises known as 609 was used by him (fol. 95); that the upper floors of both buildings were divided by wooden partitions (fol. 97); that the liquor in question belonged to him (fol. 95).

The United States Commissioner denied the appellant's petition to vacate the search warrant (fol. 102). He thereupon moved the District Court upon a written petition claiming that the search warrant was unreasonable, unlawful and violative of his constitutional rights and asked that the warrant be vacated and the property seized returned to him (pp. 4-6). The District Judge denied said application on the ground that there was probable cause for believing the existence of grounds on which the warrant was issued and directed that the property remain in the custody of the officer by whom the same was seized or be otherwise disposed of according to law (p. 3).

THE FACTS OF CAUSE NO. 636.

The Untied States Attorrey thereupon filed an information against Steele, charging him with violating the National Prohibition Act, by unlawfully possessing a quantity of intoxicating liquor, seized under the search warrant above described (No. 636, p. 1). Upon Steele's plea of not guilty, the cause was brought on for trial before Honorable Edwin L. Garvin, District Judge.

At the outset counsel for the defendant moved that the trial of the action be stayed pending the final adjudication of the appeal in No. 235, which was then pending in this Court. This application the Court denied.

In opening the case before the jury, the United States Attorney called the Court's attention to the fact that the evidence upon which the defendant was sought to be convicted was obtained upon the search warrant above referred to. Thereupon, counsel moved to suppress the testimony because the search warrant was not issued upon probable cause supported by oath or affirmation, particularly describing the place to be searched and the person or things to be seized; and that the warrant was obtained upon surmise and suspicion; also on the further ground that the person making such search was not properly authorized so to do, because he was not a civil officer of the United States, in accordance with the statute in such case made and provided.

The argument of counsel may be found at pages 4, 5 and 6 of the record.

The Trial Judge denied said application and the defendant duly excepted (fol. 6). Smith then took the stand and testified, in effect, that he had

searched the premises upon a search warrant and that he found nothing on the main floor; that on the second floor he entered a room in which he found three men bottling what he later found was whiskey; that later the defendant came in and stated that he was the lessee of the entire building, paying $780 rent therefor; that he told him that this was the first time he was handling liquor; that he was only "in the liquor game a short time"; that he placed the defendant under arrest (pp. 7 and 8). On cross examination he testified that he had never entered the premises before the search was made but that he acted under the search warrant which Einstein and he had obtained, in making the search. He admitted that *part of the premises* were used for a dwelling, in a room entirely partitioned off (fol. 12).

Einstein told a similar story (pp. 10 and 11) and on cross-examination admitted that he had never been inside the premises before making the search (p. 14); that he did not know whether the cases stencilled whiskey which he saw unloaded were filled or empty (p. 16); that *he had never examined them and never suspected that they contained whiskey* (p. 14). *He finally stated that he concluded that the boxes contained whiskey because they were so stencilled* (p. 17). His testimony makes very interesting reading; but it will serve no useful purpose to subject the same to further analysis. It is important to note, however, that he admitted that he could not see the interior of the building before he secured the warrant and that his affidavit was based upon his observation of the building from the outside (fol. 21). Again, counsel moved to suppress the testimony of Einstein on the grounds already stated (fol. 21).

At the conclusion of the trial, appellant again moved to dismiss the information on the ground that it conclusively appeared that the evidence upon which the information was based was secured upon a search warrant which was void and in violation of his constitutional rights. The motion being denied, the defendant excepted (fol. 21).

Defendant's counsel requested that the Court charge the jury as follows:

> "Mr. Kraushaar: I ask your Honor to submit as a question of fact to the jury the following: that it may find that the search made by Isidore Einstein and his associate, Mr. Smith, was unreasonable, they have a right to disregard the entire testimony.
>
> The Court: Have you authority for that request?
>
> Mr. Kraushaar: I haven't on hand, but I think I have a right to make it.
>
> The Court: Request denied. That is not in the case.
>
> Mr. Kraushaar: Exception. I ask your Honor to charge the jury that if they find from the evidence that Einstein had no reasonable or probable cause to believe that the premises on 46th Street contained intoxicating liquor in violation of the National Prohibition Act, and if they believe that the affidavit upon which the search warrant was actually issued was based upon mere surmise or suspicion or conjecture, they have a right to disregard his entire testimony and that of the Agent Smith.
>
> The Court: Motion denied. That is not in this case at all so far as you gentlemen are to consider it.
>
> Mr. Kraushaar: I except. I also ask your Honor to charge the jury that if the

warrant in this case—if they believe the warrant in this case did not particularly describe the place to be searched and the person or things to be seized, they have a right to disregard the entire testimony of Agents Smith and Einstein who made the search.

The Court: Motion denied.

Mr. Kraushaar: Exception. I ask your Honor to charge the jury as a matter of law, that if they believed that any of the provisions of Articles 4 and 5 of the Constitution of the United States have been violated by this search and seizure, they have a right to disregard the entire testimony of the agents for the Government and acquit the defendant.

The Court: Motion denied.

Mr. Kraushaar: Exception."

The assignments of error in this case may be found at pages 28 to 30, full and complete, and bring up all questions sought to be reviewed in this Court. Likewise, the assignments of error in 235 may be found at pages 4 to 6, substantially. In effect, these causes involve the following questions:

(1) Was the search warrant obtained upon reasonable and probable cause within the meaning of the constitutional provisions set forth in the Fourth and Fifth Amendments?

(2) Did the warrant particularly describe the place to be searched and the things to be seized within the meaning of the Fourth Amendment?

(3) If the warrant was deficient in these respects, was the search a violation of the constitutional rights of the appellant, John Steele?

(4) Was the Commissioner competent, under the provisions of the statutes, to issue a search warrant to a *prohibition agent, who was not a civil officer of the United States?*

(5) Did the Trial Court err in refusing to charge the jury as requested?

If the first two questions are answered in the negative by this Court, and the third question is answered in the affirmative, it must follow that the conviction of the defendant upon the evidence, secured in a manner which was unconstitutional, was erroneous; the search warrant was void and the same should be vacated and his property restored. The fourth question relates only to the validity of the conviction and if decided in our favor can only affect Cause No. 636.

POINT I.

The search and seizure was unconstitutional in that the affidavit and the warrant in pursuance of which it was directed was not based upon probable cause but upon suspicion, surmise and hearsay.

The Fourth and Fifth Amendments to the Constitution provide as follows:

> "ART. IV. The right of the people to be secure in their persons, houses, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly de-

scribing the place to be searched, and the person or things to be seized.

ART. V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

To quote the language of Mr. Justice Day in the case of *Burdeau* v. *McDowell*, 256 U. S. 465:

> An extended consideration of the origin and purposes of these amendments would be superfluous, in view of the fact that this court has had occasion to deal with those subjects in a series of cases. *Boyd* v. *U. S.*, 116 U. S. 616; *Adams* v. *N. Y.*, 192 U. S. 585; *Weeks* v. *U. S.*, 232 U. S. 383; *Johnson* v. *U. S.*, 228 U. S. 457; *Pearlman* v. *U. S.*, 247 U. S. 7; *Silverthorn* v. *U. S.*, 251 U. S. 385; *Gouled* v. *U. S.*, 255 U. S. 298."

An interesting note on the events which brought about these amendments in the Massachusetts Law Quarterly for August, 1922, page 43, will be found in the appendix to this brief.

The brief of the plaintiff-in-error in *Gouled* v. *U. S.*, *supra*, is also of value in this connection.

The terse and pointed language of the District Court in the case of *U. S.* v. *Innelli*, 286 Fed. 731, is also of interest in this connection. The Court said:

> "This motion concerns the law of arrests, searches, and seizures. They have been made time out of mind. The power to make them is an absolutely necessary power. Experience, however, has taught us that the power is one open to abuse. The most notable historical instance of it is that of lettres de cachet. Our Constitution was framed during the seethings of the French Revolution. The thought was to make lettres de cachet impossible with us. Protective guards have in consequence been thrown around us, to lessen the harassments and violations of individual rights to which we might otherwise be subjected. Such laws are seldom intentionally violated. What usually happens is that, in the zeal to perform one duty, the other is disregarded or remains unknown. This innocence of motive, however, is no justification. The law, and all laws, must be regarded. This is expected of all good citizens. To the judges it is a special command. Let it not be forgotten that there were prohibitions in the Constitution before the Eighteenth Amendment. Among them are the Fourth and Fifth. If they afford protection to the guilty, this is the price to be paid for the general good. One prohibition is that no one shall be compelled to give evidence against himself. If anything in the possession of the accused is taken from him by unlawful force, to be used in evidence against him, it cannot be so used in violation of his rights."

The search in the instant case was made under the authority of the Act of June 15, 1917, Chapter 30, Title XI, known as the Espionage Act, as the same has been made applicable to cases involving a violation of the National Prohibition Act, by Section 2 of Title 2.

The limitations of the Constitution have been incorporated in this act by the following provisions:

> "§3. Search warrants; probable cause and affidavit.
>
> A search warrant can not be issued but *upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched.*
>
> §4. Search warrant; examination of applicant and witness; affidavits and depositions.
>
> The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing, and cause them to be subscribed by the parties making them.
>
> §5. Search warrant; affidavits and depositions.
>
> The affidavits or depositions *must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.*
>
> §6. Search warrants; issue; contents.
>
> If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, *to a civil officer of the*

United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause for its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner."

Section 2, Title II of the National Prohibition Act provides as follows:

"COMMISSIONER TO REPORT VIOLATION AND UNITED STATES ATTORNEY TO PROSECUTE—Sec. 2. The Commissioner of Internal Revenue, his assistants, agents and inspectors shall investigate and report violations of this act to the United States Attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the attorney general, as in the case of other offenses against the laws of the United States; and such commissioner of internal revenue, his assistants, agents and inspectors may *swear out warrants** before the United States commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to the control of the United States attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury. Section 1014 of the Revised Statutes of the United States is hereby

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* Note statute reads "swear out" not "and execute or serve."

made applicable to the enforcement of this act. Officers mentioned in said section 1014 are authorized to issue search warrants *under the limitations provided* in Title XI of the act approved June 15, 1917."

We have already observed that the sole basis for the issuance of the search warrant was the affidavit of Einstein.

We contend that the facts set forth in this affidavit are insufficient to establish probable cause for believing that sufficient ground existed to believe that the garage in the premises sought to be searched was used for the purpose of illegally possessing contraband liquor.

What is meant by the expression "probable cause" as used in the constitutional amendment? The great weight of judicial opinion is in favor of the view that mere rumor, surmise, conjecture or suspicion cannot form the basis for believing the existence of probable cause.

Baund v. *South Carolina Ry. Co.*, 57 Fed. 485.

United States v. *Lai Chew*, 298 Fed. 652.

United States v. *Casino*, 286 Fed. 976.

Salata v. *United States*, 286 Fed. 125.

United States v. *Boasberg*, 283 Fed. 305.

Central Consumers Co. v. *James*, 278 Fed. 249.

United States v. *Kelih*, 272 Fed. 484.

United States v. *Armstrong*, 275 Fed. 506 (see Opinion, p. 508).

United States v. *Borowsky*, 268 Fed. 408.

United States v. *Pitotto*, 267 Fed. 603.

United States v. *Rykowsky*, 267 Fed. 866.
Veeder v. *United States*, 252 Fed 414-418.
Giles v. *United States*, 284 Fed. 208.
Ripper v. *United States*, 178 Fed. 24.
State v. *District Court* (Mont.), 198 Pac. 362.
Adams v. *Commonwealth* (Ky.), 246 S. W. 788.
Colley v. *Same* (Ky.), 243 S. W. 913.
Craft v. *Same* (Ky.), 247 S. W. 722.
Youman v. *Same*, 189 Ky. 152, 224 S. W. 860.
Ash v. *Same*, 193 Ky. 452, 236 S. W. 1032.
Colley v. *Same*, 195 Ky. 706, 243 S. W. 1032.
Terril v. *Same*, 189 Ky. 152, 224 S. W. 860.
State v. *Peterson*, 27 Wyo. 185, 194 Pac. 342.
People v. *Effelhey* (Mich.), 190 N. W. 727.
People v. *Knopka* (Mich.), 190 N. W. 731.
People v. *De Vasto* (App. Div.), 190 N. Y. S. 816.
Welles v. *People* (App. Div.), 197 N. Y. S. 758.
Cooley's Const. Limitations (4th Ed.), 372.

These Courts unanimously hold that the affidavit upon which the search warrant is obtained cannot consist of mere conclusions based on hearsay or upon information and belief, but must set forth evidentiary facts upon which such conclusions are based and, taken together, to be of such a nature that the Magistrate may be satisfied that there was

reasonable ground for believing that a crime is being or has been committed in the premises to be subjected to search and seizure.

Other Courts have taken the contrary view, and hold that hearsay may be sufficient, without even a statement of the sources from which the hearsay was derived.

Watson v. *State* (Neb.), 189 N. W. 620.
People v. *Kennedy*, 303 Ill. 423.
People v. *Schaeffer* (Wash.), 207 Pac. 220.
State v. *Kees* (W. Va.), 114 S. E. 617.
Cochran v. *State* (Ohio), 138 N. E. 54.
State v. *Boulter*, 5 Wyo. 236, 39 Pac. 883.
In re Search 15 E. 23rd Street, 284 Fed. 914.
Bookbinder v. *United States*, 287 Fed. 790, certiorari denied, 43 Sup. Ct. Rep. 523.
Bookbinder v. *United States*, 278 U. S. 216.
United States v. *Leper*, 288 Fed. 136.
Zimmerman v. *Bedford* (Va.), 115 S. E. 363. (See criticism of this opinion in 8 Va. Law Register, N. S., p. 936 *et seq.*)

The *Bookbinder* case, *supra*, involved the seizure of liquor claimed to have been smuggled into the United States and not the seizure of liquor believed to be in stock for the purpose of illicit sale. The District Court (278 Fed., at pp. 218-219), in declining to quash the search warrant, drew a distinction between these two cases, holding, by inference, that in the case of the later violation stronger evidence would be required to establish probable cause than in the case of smuggled stock, and cited among other decisions the case of *Locke*

v. *United States,* 7 Cranch. 339, a decision by Chief Justice Marshall, holding that where a libel was brought by the United States for the condemnation of merchandise claimed to have been smuggled, the *"onus probandi"* was not upon the United States to prove that the goods were smuggled but that the burden of proof lay with the claimant to establish that the goods were free from taint. The Chief Justice wrote as follows:

> "It is contended, that probable cause means *prima facie* evidence, or, in other words, such evidence as, in the absence of exculpatory proof, would justify condemnation. This argument has been very satisfactorily answered on the part of the United States, by the observation, that this would render the provision totally inoperative. It may be added, that the term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation; and in all cases of seizure, has a fixed and well-known meaning. It imports a seizure made under circumstances which warrant suspicion. In this, its legal sense, the court must understand the term to have been used by congress."

This language convinces us that the term "probable cause" as used in the Revenue Statute then under consideration could not have been intended in the same sense as expressed in the constitutional limitation; for, if search warrants against persons, their houses and effects can be issued on mere suspicion or conjecture, then the constitutional amendment becomes a mere empty platitude and by construction is relegated to the museums of history, no longer to be considered one of the

palladiums of our liberty, but a mere fiction like those of the common law, which are continued only because they may mystify and impress the layman but of no practical importance. The search warrant would be similar to the writs of assistance or general warrant, condemned by Lord Camden in *Enting* v. *Carrington,* 19 How. St. Tr. 1029, which subsequently became so potent a cause for the American Revolution. As was pertinently remarked by Judge Anderson in his dissenting opinion in *Park* v. *United States,* 294 Fed. 784, at page 790:

> "Nor should it be overlooked that alcohol is not the only thing that intoxicates. Power is, to the average human being, at least as intoxicating as alcohol. Historically, our Bills of Rights are limitations upon authority vested by governments in officials. These guaranties of personal liberty were attempts by our forefathers to protect citizens against the abuses growing out of the intoxication from official power. They were wise and necessary precautions."

Suspicion and surmise may be sufficient for the seizure of merchandise smuggled into the country but suspicion and surmise certainly cannot be said to be probable cause, for the issuance of a warrant to search persons' houses and effects, within the meaning of the Constitution.

Properly construing the provisions of the Espionage Act above referred to, in the light of the Fourth Amendment to the Constitution, it would seem plain that Congress intended, before a search warrant could be issued against the houses and effects of those charged with a felony or a violation of the National Prohibition Act, it

was incumbent to produce before a judicial officer proof, by affidavit of a person having knowledge of the facts or circumstances, such sworn proof as would be of so convincing a nature as to show that there were reasonable grounds to believe that a crime was committed and that, in cases where property is to be searched, the evidence of crime is concealed upon the premises sought to be searched.

In the recent case of *Schenks* v. *United States*, 2 Fed. (2nd) 185 (Ad. Sh., Jan. 15, 1925, No. 2), Judge Smith of the Court of Appeals of the District of Columbia said:

> "The Fourth Amendment to the Constitution prescribes in terms that cannot be mistaken that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and that no warrants shall issue, *but upon probable cause,* supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. The principle of that amendment found favor with the American people a long time before they thought of a Declaration of Independence, a Confederation of States, or a Constitution which would secure their property, their persons, and their homes against unwarranted invasion.
>
> The colonists had no objection to searches and seizures which were ordered upon reasonable grounds for the enforcement of the laws of the land and which the public welfare demanded. They had been taught, however, by the writs of assistance, which met with scant approval even in England, that police officers could not be safely intrusted with unchecked and unrestricted powers to have their will with the person,

the property, or the home of the citizen, and they resented with all their souls the issuance of process which left no one responsible for wrongful or unjustified intrusions on their privacy and their personal and property rights. Indeed, it is not too much to say that of all the causes which led to the Revolution against the mother country, to which the colonies were bound by ties of blood and cherished traditions, nothing more excited the spirit of revolt than unreasonable searches and seizures made under color of law.

When the colonies acquired by force of arms the right to govern themselves, the people did not forget the galling oppressions to which they had been subjected by loosely granted search and seizure writs. They therefore demanded and finally obtained the Fourth Amendment, which was designed to prevent their official servants from becoming their arbitrary and irresponsible masters under the guise of law.

[1-3] The federal courts have most jealously guarded the rights secured to the people under that amendment, and have uniformly held that its purpose cannot be evaded by the issuance of writs on sworn declarations which would permit the person or persons making them to escape responsibility therefor. A sworn statement that a person is informed and believes, or has reason to believe and does believe, that certain facts exist, is not a positive statement that they do exist, or that they are true, and leaves no one responsible for a search or seizure, in case the information of the affiant or deponent should prove to be incorrect, or in case there should be no sound basis for his belief. If the peace officer has reason to believe and does believe that a search or seizure ought to be made,

he should state in his affidavit the facts which led him to that conclusion, and which were known to him of his own knowledge. If he has no first-hand information as to the material facts, but has been informed by another as to facts or conditions which would justify the issuance of process for search or seizure, the officer should secure the informer's affidavit positively alleging of the latter's own knowledge the existence of such facts or conditions. In the event that the informer is unwilling to make such an affidavit, he should be subpoenaed to appear before the judge or commissioner to give testimony as to the truth of the statements made by him to the officer.

Peace officers, to their credit be it said, zealously endeavor as a rule to bring lawbreakers to justice, but unfortunately they are easily satisfied as to the guilt of an accused, although having no legal evidence to convict. To permit them to search for evidence because they deposed that they had reason to believe and did believe that the law had been broken, or because they deposed that they were *informed and believed* that certain facts existed, would leave the home, the property, and the person of the citizen at the mercy of mere suspicion, and of misstatements and misinformation for which no one could be held accountable. It is true that section 3462 of the Revised Statutes (Compt. St. § 6364) does provide that a search warrant may be issued if a revenue officer makes oath in writing 'that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of the said premises'; but that does not authorize the issuance of a warrant on an affidavit which would result in defeating the purpose of the Fourth Amendment.

The Constitution is paramount, and the courts will not permit the evasion of the Constitution by validating writs issued on sworn declarations, which literally comply with the terms of the statute, but which fail to establish probable cause, inasmuch as they state the facts on information and belief or state conclusions of fact or of law, instead of positively alleging the material facts. Ripper v. United States, 178 F. 24-26, 101 C. C. A. 152; United States v. Ray (D. C.), 275 F. 1004-1006; Veeder v. United States, 252 F. 414, 418, 420, 164 C. C. A. 338; Boyd v. United States, 116 U. S. 624-630, 6 S. Ct. 524, 29 L. Ed. 746. To hold otherwise would reduce search warrants to the status of the old writs of assistance, and would fritter away the rights guaranteed by the Fourth Amendment, thereby giving free rein to abuses, hateful to a form of government which is intolerant of the arbitrary and irresponsible exercise of power.

We must hold, therefore, that affidavits or depositions which simply state that the affiant or deponent has reason to believe and does believe that a crime has been or is in course of being committed, or which go no farther than to allege conclusions of law or of fact, or which set out on mere information and belief the material facts on which the right to search or seize is based, are insufficient to support a search warrant, and any search warrant issued on such affidavits or depositions is invalid. Ripper v. United States, 178 F. 24-26, 101 C. C. A. 152; Veeder v. United States, 252 F. 414, 418, 420, 164 C. C. A. 338; Salata v. United States (C. C. A.), 286 F. 125, 126; United States v. Pitotto (D. C.), 267 F. 603, 604; United States v. Rykowski (D. C.), 267 F. 866, 869; Giles v. United States (C. C. A.),

284 F. 208, 212-214; Gouled v. United States, 255 U. S. 298, 308, 309, 41 S. Ct. 261, 65 L. Ed. 647.

[4] The federal courts have emphatically held that the admission of property or papers taken from a defendant in violation of his constitutional rights virtually makes him a witness against himself, contrary to the provisions of the Fifth Amendment, and is reversible error. Salata v. United States (C. C. A.), 286 F. 125, 126; Boyd v. United States, 116 U. S. 616, 630, 6 S. Ct. 524, 29 L. Ed. 746; Weeks v. United States, 232 U. S. 383, 396, 398, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; Silverthorne Lumber Co. v. United States, 251 U. S. 385, 391, 392, 40 S. Ct. 182, 64 L. Ed. 319; Gouled v. United States, 255 U. S. 298, 303, 304, 306, 311, 312, 313, 41 S. Ct. 261, 65 L. Ed. 647. As the search warrant was illegally issued, the articles and things seized thereunder were taken in violation of defendant's constitutional rights, and the admission of them over objection as evidence against her was error."

Tested by this rule, the affidavit of Einstein in the instant case, upon which this search warrant was obtained, falls far short of constituting probable cause. The bare allegations are made that, standing in front of a garage located in the building 611 West 46th Street, used for business purposes only, he saw a truck driven into the entrance and saw the driver unload from the end of the truck a number of cases stencilled "whiskey," which cases had the appearance of being whiskey cases and that he believed they actually did contain whiskey. He concludes his affidavit by the

statement, on information and belief, without disclosing the sources of his information or the grounds for his belief, that the premises "have therein a quantity of intoxicating liquor containing more than ½ of 1% of alcohol by volume and fit for beverage purposes, which is used or has been used and is intended for use in violation of the statute, etc."

He does not say whether the garage in question is a public or a private garage. He does not disclose the name of the person operating the same. He does not state that he saw the truck leave the premises, leaving the cases marked whiskey in the garage. He does not say that he examined the cases and found them to contain intoxicating liquor. He does not state how long he stood at the premises and watched the goods being unloaded. He does not describe the nature of the building in which the garage is contained, other than to say that it was used for business purposes only. Indeed, it was a mere speculation on his part whether the boxes actually did contain whiskey or were mere empty boxes. On his examination before the Commissioner who issued the warrant Einstein swore that he had never been inside of this building; that all the information he acquired was from the outside thereof, standing at a distance of 30 feet from the scene of activity; that he judged that it was a business building, only from the outside of it; that he did not actually know whether the boxes contained whiskey and, indeed, when the search was made, no whiskey was found in the garage itself, at the point where the boxes were unloaded, but a quan-

tity of contraband merchandise was found in other parts of the building. The latter circumstances will be discussed in detail below.

The allegation, made on information and belief, that the premises contained intoxicating liquor, without disclosing the sources of information and the grounds of belief, was surely without evidentiary value whatsoever and is not a statement under oath which can be the subject of a prosecution for perjury.

By the great weight of authority, this statement amounts to a mere nullity. So that, the search in question was clearly conducted *upon mere speculation, surmise and suspicion* and in complete disregard of the constitutional rights of the plaintiff-in-error and appellant. The case of *United States* v. *Casino, supra*, was a similar case and Judge Hand wrote, applying the rule that *prima facie* evidence is required to establish illegal possession, as follows:

> "The affidavit on which the warrant was granted did not allege that on April 17, 1922, the liquor was still in the garage, though the return and this motion both show that this was the fact. The question is, then, whether it was enough, to justify a search two days later that a truck had gone into the petitioner's garage loaded with liquor. Had the agent seen the liquor unloaded from the truck, that would be some evidence of illegal possession by the owner of the garage. Had he waited, and the truck come out empty, that, too, would have been some evidence, or, if the whiskey cases had borne any evidence of ownership by Casino, it would have been quite different. The affi-

davit shows none of these things. On the contrary, it only says that a truck loaded with whiskey drove into the petitioner's garage, which for all that appears may have been doing business as a public garage. That, it seems to me, is not enough to give a right forcibly to search the premises two days later. It is equally consistent with a stop by the truck at the garage for repairs, oil, gas, air or water, or even to pay a visit. It will not, therefore, serve as *prima facie* evidence that the liquors were illegally retained upon the premises when the warrant issued."

POINT II.

The search was unconstitutional in that the affidavit and the warrant in pursuance of which it was made did not particularly describe the place to be searched or the things to be seized.

The affidavit upon which the warrant was issued described the place at which Einstein saw the small truck as a "garage" in the building located at 611 West 46th Street, Borough of Manhattan, City, and Southern District of New York. The nature of this building was not described, and of what heighth, width, construction, occupation or a distinguishing feature is not given, and all that was said by Einstein was that it was used for business purposes only. The warrant directed Einstein to search the four-story building at 611 West 46th Street, Borough of Manhattan, City, and Southern District of New York, said building being used for business purposes only, and any safe, desk, store

room, receptacle, container, basement or sub-cellar, building, room or rooms used in connection with said garage, and directed the search to be made in the aforesaid premises on said premises.

When the warrant was controverted, and on the trial of the criminal information, Einstein admitted that he had never been inside of the building; that he never knew, before obtaining the search warrant, anything about the upper stories thereof. *The affidavit upon which he secured the warrant did not set forth that there was any garage, safe, desk, store room, basement, cellar, sub-cellar, room or rooms connected with or used in connection therewith*, and yet this search was allowed not only for the garage, but in addition for these other places. The place at which he is alleged to have seen boxes marked "Whiskey" was not the place where, after search, any contraband was found. The contraband was found in other parts of the building, which had to be reached by the officer making the search by means of an interior elevator therein. Indeed, *only part of the building was known as 611 West 46th Street,* the other part being known as No. 609. And the liquor which was found after search was found in the latter part, and not in that part which is described in the search warrant. Is this a substantial compliance with the constitutional provisions? If it is, then the constitutional provisions designed to protect the citizens against so-called general warrants have no meaning.

The following authorities support the view that this warrant is void:

United States v. *Friedman*, 267 Fed. 856.
People v. *Mush* (Mich.), 190 N. W. 668.
State v. *Malarkey* (Mont.), 180 Pac. 675.
United States v. *Boasberg*, 283 Fed. 305.
United States v. *Alexander*, 278 Fed. 308.
People v. *Mitchell*, 274 Fed. 128.
United States v. *Innelli*, 286 Fed. 731.
United States v. *Borkowski*, 268 Fed. 408.
United States v. *Rykofski*, 267 Fed. 866.
Lipschitz v. *Davis*, 288 Fed. 974.
United States v. *Vigneau*, 288 Fed. 977.
Atlantic Food Products Corp. v. *McClure*, 288 Fed. 982.
United States v. *Friedberg*, 233 Fed. 313.
United States v. *Slusser*, 270 Fed. 818.
In the Matter of Application for a Search Warrant, 116 Misc. 512, 190 N. Y. Supp. 574.

The latter case is expressly in point. This was a case arising in the State Court. A search warrant was obtained, authorizing the State officials to search premises situated at 52 Front Street, Newburgh, for intoxicating liquors. The agents searched the building located at 57-59-61 Front Street. The search warrant was quashed on the ground that the description of the premises as No. 52 Front Street was no authority for the search of premises 57-59-61 Front Street.

In the case at bar, the warrant, if valid at all, would only authorize the search of the garage at 611 West 46th Street. It certainly could not authorize the search of the garage in premises 609;

but, even if such authority were given, certainly there was no authority to search the upper parts of the building, in the absence of proof in the affidavit upon which the warrant was issued, that they were used in connection with or formed a part of the garage.

In the case of *United States* v. *Slusser, supra,* the Court said, at page 819:

> "(1) First, as to the legality of the search: The search so permitted by Slusser, after declaration by the prohibition officer, with a display of his badge, that they were there to search the premises, was not by such consent as will amount to a waiver of constitutional rights, but on the contrary, is to be attributed to a peaceful submission to officers of the law. There is nothing to the contrary in the cases cited by counsel for the government, viz. United States v. Gouled (D. C.), 253 Fed. 242; Ripper v. State, 178 Fed. 24, 101 C. C. A. 152; McClurg v. Brenton, 123 Iowa 368, 98 N. W. 881, 65 L. R. A. 519, 101 Am. St. Rep. 323; State v. Griswold, 67 Conn. 292, 34 Atl. 1046, 33 L. R. A. 227.
>
> (2) The right of the people to be secure in their houses and effects against unreasonable searches and seizures is not limited to dwelling houses, but extends to a garage used as this was, personally and for hire. If the rule be not so, then not only a garage, but every warehouse, shop, store and office, and even a safe deposit vault, might be ransacked for liquor by officers upon suspicion. Such is not the law. The right to be protected against unlawful search and seizure extends even to a corporation. Silverthorne Lumber Co. v. United States, 251 U. S. 385,

40 Sup. Ct. 182, 64 L. Ed. 319. And a corporation cannot be said to occupy a dwelling house. In Jones v. Fletcher, 41 Me. 254, trespass quare clausum was maintained against an officer, who, with warrant to search the dwelling, searched the barn and seized liquor stored therein. See also, People v. Marxhausen, 204 Mich. 599, 171 N. W. 557, A. L. R. 1505.

(3) *An unlawful search cannot be justified by what is found. A search that is unlawful when it begins is not made lawful when it ends by the discovery and seizure of liquor. It was against such prying, on the chance of discovery, that the constitutional amendment was intended to protect the people.*

(4) Neither is the discretion of the officer, however good and well intentioned, a substitute in law for a search warrant issued by a proper magistrate. It is to the latter that the law has committed the discretion to say when a warrant shall issue; and it can only issue on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person or things to be seized. Constant reiteration of these fundamental principles is warranted by the fact that they seem to be so frequently overlooked."

In *United States* v. *Friedberg*, 233 Fed. 313, the Court said:

"I think the question as to what is an unreasonable manner of search and seizure, where the question is raised, as here, in resisting a seizure of papers by demand for their return, must be determined by the terms of the Fourth Amendment itself, which provides the requisites for a warrant. *A search, to be lawful, and therefore reasonable, must be confined to the place, and the*

seizure to the things, particularly described. If it were not the case that the place to be searched and the things to be seized must be those particularly described, the effect would be that a search warrant providing for the search of a particular place and the seizure of particular things would become a general warrant when placed in the hands of the government officers. The history of the Fourth Amendment by Mr. Justice Bradley in Boyd v. United States, 116 U. S. 616, 3 Sup. Ct. 524, 29 L. Ed. 746, is reviewed in the opinion of Mr. Justice Day in Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834 Ann. Cas. 1915C 1177, and, as there shown, it took its origin in the determination of the framers of the amendments to provide for the Constitution a Bill of rights, securing to the people those safeguards which had grown up in England to protect the people from unreasonable searches and seizures, such as were then permitted under general warrants issued under the authority of the government. By this practice there had been invasions of the home and privacy of the citizens and seizure of their private papers in support of charges, real or imaginary, made against them, and it is stated in the opinion that such practices had also received sanction under warrants and seizures under the so-called writs of assistance, issued in the American colonies. The emphasis which is laid upon the wrongs permitted under general warrants indicates that it was not the intention of the framers of the amendment to permit, under a warrant particularly describing a place and things, a search of other places and a seizure of other things than those particularly described. As was said by Mr. Justice Bradley in the Boyd Case, the essence of the offense against the

Constitutional Amendment 'is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense. * * *'

In so far as the revenue officers searched the premises at 1516 Moyamensing Avenue and seized books and papers there, they were acting without the authority of any warrant describing the premises or the things there seized and in violation of law. The books and papers seized at the premises 234 North Third Street were not and could not be claimed to be within the description of the 'thinks to be seized' upon those premises.

The government seeks to justify the seizure entirely upon the ground that the papers are to be used as evidence upon which the government intends to prove the guilt of the defendant in a criminal prosecution and to forfeit his property in the proceedings in rem contemplated under section 3453. The papers seized are not forfeitable, and hence not subject to seizure. In the seizure, the revenue officers were acting clearly beyond the authority of the warrant, without authority of law, and in violation of the petitioner's constitutional rights. The exigency of necessity for obtaining evidence in a particular case does not justify the tendency which has grown up to proceed by 'raid' of the house and property of a supposed offender, rather than by the orderly process provided by law and guaranteed by the Constitution.

The rule will be made absolute."

The testimony at the time the warrant was controverted before the Commissioner discloses, without dispute, that part of the premises, the second floor, was used by the Liquid Carbonia Company,

which installed shelving and fixtures; half of the third floor was used by medical people by the name of Betts & Company (No. 235, pp. 42-43).

The facts in this case are similar to that of the case of the *United States* v. *Inelli* (*supra*), where the Court said (at pp. 732-733):

> "A further one is directed to the description of the place. It is described by street and number, and the name of the person to whom the premises then or formerly belonged. Had the whole premises included within the description belonged, as was doubtless erroneously taken for granted, to the person whose place was meant to be searched, such a description as that given might meet all practical needs. *The fact, however, is that the second floor of the premises belonged to a transportation company.* It must not be forgotten that a warrant is a command which must be obeyed. It is true that the persons to whom it is directed are expected to use judgment and discretion in its execution, but the command is none the less imperative. Such a command should not direct a search which would be wholly unjustified. If the place described by street and number is used by a number of persons for different purposes, then it is not a place; but there are several places included in the one description. It is then a general, but not a 'particular' description. The evidence upon which the warrant issues should go to all the essential features of the authority given, and the particular place to be searched is one, and an important one.
>
> The evidence in the instant case admittedly did not justify a search of the place described in the warrant. The description

> was too broad, and included premises to search which no probable cause appeared. This does not mean that the facts are to be found after the search, and the warrant upheld or not according as the facts are made to appear. The finding under review is one not of guilt, but of probable cause. Probable cause may exist, and a search warrant properly issue, although the real facts may be found not to justify it. This is true of any case of arrest. The existence of probable cause for arrest is not inconsistent with a finding of not guilty. The evidence before the commissioner in respect to the place was too general and too meager to permit the place to be searched to be 'particularly described,' and for this reason the search warrant proceeding cannot be sustained."

Certainly, even assuming for the sake of argument, that the entire building was under the control of the plaintiff-in-error and appellant, the affidavit upon which the search warrant was issued certainly did not justify the issuance of a warrant embracing the entire building. Had the affidavit set forth that the entire building was used as a garage by one person, by the same interests, then the building, if it can be said that there was probable cause for believing that the building contained contraband liquor, might have been subjected to search, but where the affidavit confined the place where the contraband was found to the garage in the building, the issuance of a warrant directed to other parts of the building was a flagrant violation of Steele's constitutional rights.

Concededly the entire building was not used as a garage, and concededly the contraband which was found was not found in the part of the building

where it was stated to be by the prohibition agent. We submit that the record discloses that there was no basis for the issuance of a warrant for the entire building; there was no basis, as the language of the warrant says, for the search of a safe, desk, store room, etc., used in connection with the garage, and that this search was entirely unconstitutional.

We now come to the discussion of the question of whether or not the property to be seized was adequately described.

Einstein states in his affidavit that he saw a number of cases stencilled "whiskey" being unloaded from a truck in the garage. How many cases he does not state; whether one, two or three, or more than that number. The warrant issued upon this affidavit was not to search for these cases stencilled "whiskey" but directed Einstein to search for certain intoxicating liquor containing more than one-half of one per cent. of alcohol by volume, fit for beverage purposes. Was this a particular description of the things to be seized? Obviously it was not (*State* v. *Peterson,* 27 Wyo. 185, 194 Pac. 342, at p. 350; *Keefe* v. *Clark,* 287 Fed. 372).

There have been cases taking a different view of the law in this matter:

Elrod v. *Moss,* 278 Fed. 123 (at p. 129).
Petition of Barbour, 281 Fed. 550.
Watson v. *State* (Neb.), 189 N. W. 620.

The reasoning of these cases is specious. In the *Elrod* case the Court said that because liquor is contraband "there can be no danger of a citizen being deprived of property which he is lawfully entitled to hold against the State." This entirely

overlooks the fact that all intoxicating liquor containing more than one-half of one per cent. of alcohol is not contraband. Liquor such as is held for permitted uses, such as for medicinal and sacramental purposes, is certainly not prohibited by law, nor is liquor held in a private dwelling acquired before the National Prohibition Act became effective, contraband.

Matter of Barbour holds that a general description of liquor, such as is here involved, is permitted, unless it can be shown that the person was misled or prejudiced by such description. Such a rule would throw the entire burden of proof on the person against whom the search is directed, rather than on the Government under the constitutional requirements and under the legislative intent as evidenced by the Espionage Act.

It may be argued that a more definite description could not possibly be devised by Government agents. A difficulty in acquisition of evidence sufficient on which to base a search warrant, certainly cannot be reason for relaxing the constitutional guarantees. It would not tax the imagination greatly to conceive of cases where an adequate description for contraband can be devised. Looseness in such a matter would tend to break down the constitutional guarantees by judicial interpretation, and should not be tolerated for any reasons of expediency.

POINT III.

The warrant of search and seizure was executed by an unauthorized officer and is void.

The 6th and 7th assignments of error (No. 636, p. 29) are as follows:

> "6. On the further ground that the search warrant was not issued to a civil officer of the United States and that the person authorized to make such search and seizure, to wit: Isidor Einstein, was not a civil officer of the United States, authorized to make search and seizure under the statute in such case made and provided.
>
> 7. On the further ground that the said affidavit, or the oath or affirmation upon which said search warrant was based, contained no proof that Isidor Einstein was authorized by the Commissioner of Internal Revenue or any other officer of the United States to execute such warrant for search and seizure."

Section 6 of the Act of June 15, 1917, Chapter 30, Title XI, quoted on pages 17-18 of our brief, provides that the warrant should issue to "a civil officer of the United States, authorized to enforce or assist in enforcing any law thereof, or a person so duly authorized by the President of the United States."

Einstein, in his affidavit, produced no proof that he was authorized by the President of the United States to enforce or assist in enforcing any law thereof, nor did he state that he was a civil officer of the United States. In his affidavit he describes

himself as a "general prohibition agent" assigned to duty in the State of New York.

Upon the criminal trial upon the information charging the plaintiff-in-error with unlawfully possessing intoxicating liquor, he testified that he was employed by the Treasury Department of the United States and was so employed since the National Prohibition Act went into effect in 1920 (No. 235, p. 10, fol. 12). As a general prohibition agent he was not a civil officer of the United States, and hence the warrant is void.

United States v. *Musgrave*, 293 Fed. 203.

The above decision was challenged by the following cases:

United States v. *O'Connor*, 294 Fed. 584.
United States v. *American Brewing Co.*, 296 Fed. 772.
United States v. *Edwards*, 296 Fed. 512.
United States v. *Montalbano*, 298 Fed. 667.
Smith v. *Gillian*, 282 Fed. 628.
United States v. *Syrek*, 290 Fed. 823.
United States v. *Loeffelman*, 297 Fed. 472.

We do not believe the reasoning of these cases is sound, in view of the plain provision of the Espionage Act, making it clear that the intention of Congress was that a search warrant may be sworn out by any person but can only be executed by one in whom trust or confidence may be imposed, having the dignity of either a civil officer of the United States or duly appointed for that purpose by the President of the United States.

In the case of *United States* v. *O'Connor, supra*, the learned District Judge argues that because Sec-

tion 2, Title II of the National Prohibition Act, the Commissioner of Internal Revenue and his agents are directed to investigate and report violations and swear out warrants, and by Section 5 he and his agents and inspectors are vested with power for the enforcement of existing laws relating to the manufacture and sale of intoxicating liquor, under the laws of the United States, and because by Title II, subdivision 1, the Commissioner may delegate or designate an agent to perform such acts as he is by law authorized to perform and because by Title II, Section 26 of that law, the Commissioner is authorized to make seizures of vehicles discovered in the act of unlawfully transporting liquor, and because by Section 28 of Title II he is vested with all the power and protection in the enforcement of the Act, which is conferred by law for the enforcement of existing laws relating to intoxicating liquors, and by Section 3462 of the Revised Statutes, search warrants may be issued to *internal revenue officers* for execution, it follows that the power to permit the *execution of search warrants* by prohibition agents *is thus impliedly conferred.* It is further argued that under Section 6 of the Act supplemental to the National Prohibition Act, 42 Stat. 223, an officer, agent or employee of the United States who makes a search *without a warrant* may be held liable for a misdemeanor and fined; that this latter section also confirms, by implication, the power of a prohibition agent to execute a search warrant.

We cannot believe that Congress so intended. If it had, it would have been an easy matter to have conferred such *power expressly rather than by implication.*

Section 3462 of the Revised Statutes authorizes the issuance of a search warrant to an internal revenue officer upon his oath, if he has reason to believe and does believe that a fraud upon the revenue has been or is being committed. This section cannot apply to cases other than smuggling as otherwise it would conflict with the Fourth Amendment as we have shown under our first point.

If Congress had intended that this provision of the Internal Revenue Laws should have application to the enforcement of the National Prohibition Act, it would not have made the provisions of the Act of June 15, 1917, expressly applicable to violations thereunder, but would have expressly made Section 3462 of the Revised Statutes applicable. The Act of June 15, 1917, is all inclusive and sets forth minutely the procedure to be followed in the issuance of a search warrant.

Nor is the power to execute search warrants extended to prohibition agents because the Act supplemental to the National Prohibition Act prohibits agents of the Commissioner of Internal Revenue from searching without a warrant. True, the implication is that they are permitted to search if a warrant is issued, but it does not follow that they are thereby authorized by implication to execute them.

There is a distinction to be observed between a person *authorized to execute a warrant* and a person *authorized to perform the actual labor of the search*. Thus, by Section 7 of the Act of June 15, 1917, it is provided that "a search warrant may in all cases be served by any other officer mentioned in its direction, but by no other person, except in aid of the officer on his requiring it, he being pres-

ent and acting in its execution." In other words, a prohibition agent or an agent of the Department of the Commissioner of Internal Revenue may aid in the search and engage in the actual physical labor of a search of the premises, provided the same is done under the supervision of a civil officer of the United States and at his request, is what the Congress clearly intended should be the procedure to be followed, as otherwise any irresponsible person, without standing or character, who may temporarily be employed by the Commissioner of Internal Revenue may secure search warrants, violating the personal liberty of citizens and conduct unreasonable and unconstitutional searches and seizures. It was clearly the intention of Congress to leave this dangerous remedy in the hands of cool and impartial officers of the Government, rather than persons, who either by misguided zeal or actual corruption may abuse their powers and privileges and thus bring the administration of justice and the Constitution into public contempt.

POINT IV.

The Trial Judge erred in refusing to charge the jury as requested.

The 12th assignment of error is as follows (No. 636, p. 30; see pp. 22, 23):

> "12. On the ground that the Court erred in refusing to charge the jury as requested by the defendant as follows: 'That it may find that the search made by Isidor Einstein

and his associate, Mr. Smith, was unreasonable, they have a right to disregard the entire testimony.' Also, 'That if they find from the evidence that Einstein had no reasonable or probable cause to believe that the premises on 46th Street contained intoxicating liquor in violation of the National Prohibition Act, and if they believe that the affidavit upon which the search warrant was actually issued was based upon mere surmise or suspicion or conjecture, they have a right to disregard his entire testimony and that of the Agent Smith.' Further, That 'If they believe the warrant in this case did not particularly describe the place to be searched and the persons or things to be seized, they have a right to disregard the entire testimony of Agents Smith and Einstein, who made the search.' And lastly, 'That if they believe that any of the provisions of Articles 4 and 5 of the Constitution of the United States have been violated by this search and seizure, they have a right to disregard the entire testimony of the agents for the Government and acquit the defendant.' "

Probable cause is a mixed question of law and fact. Whether the circumstances alleged to show it probable or not probable existed, is a matter of fact; but whether, supposing them true, they amount to probable cause, is a question of law.

Assuming for the sake of argument, but of course without conceding, that *prima facie* the evidence in the form of the affidavit before the Commissioner in issuing the search warrant was sufficient to show probable cause and contained a sufficient description of the property to be searched and the things to be seized, nevertheless whether this affidavit was true and whether Einstein who

testified at the trial told the truth, was certainly a question of fact for the jury. They were not bound by his testimony, even though it was not contradicted, bearing in mind the surrounding circumstances, his interest in the case as one of the prosecutors.

But assuming without conceding that the jury could not disregard the testimony of Einstein and bound to accept the same, certainly the circumstances were such, to say the least, that *it cannot be said as matter of law* that there was probable cause and a proper description to authorize this warrant of search and seizure. The deductions from the testimony of Government's witnesses are such, providing the Court is willing to resolve the questions of law in favor of the Government, that reasonable minds may well differ as to whether what Einstein said would afford reasonable grounds for the issuance of a search warrant. That question should have been submitted to the jury to be passed on by it as a question of fact.

The refusal to charge as requested, was, therefore, clearly error (*Miller* v. *Brown*, 3 Mo. 127, 23 Am. Dec. 693).

CONCLUSION.

Having shown that the search warrant was void; having shown that the search was unreasonable and a violation of the constitutional rights of the plaintiff-in-error and appellant, and that the evidence upon which the plaintiff-in-error was convicted was based upon such search and seizure, in violation of the Fifth Amendment, the Trial Judge erred in refusing to suppress such evidence, and the District Court erred in making the decree from which the appeal is taken.

It is needless to point out that the mere fact that the evidence secured upon the search proved that the plaintiff-in-error was violating the National Prohibition Act is no answer. The search cannot be legalized by the evidence discovered by violating the constitutional rights of the accused (*Gouled* v. *United States,* 255 U. S. 298).

POINT V.

The judgment and decree appealed from should be reversed with directions to the District Court to vacate the search warrant and restore the property seized to the claimant, and the judgment of conviction should be reversed and a new trial directed.

Respectfully submitted,

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and Appellant.

APPENDIX.

"There is some dramatic history in connection with the constitutional provisions about search and seizure which has a distinctly humorous as well as a serious aspect. The tenth article of the Virginia Bill of Rights of 1776, the fourteenth article of the Massachusetts Bill of Rights, and the fourth amendment to the Federal Constitution were popular expressions of protest against the enforcement of laws which were commonly regarded as arbitrary and unreasonable, in other words, they grew out of the common opinion in colonial America that 'smuggling' in violation of the unreasonable and obnoxious British trade restrictions were not only an adventurous and patriotic sport and a lucrative occupation, but almost an inalienable right. This view was strong in New England, and, of course, the attention of the colonists was focussed on the whole matter by the dramatic argument of James Otis against the Writs of Assistance in the Old State House in Boston in 1761.

"The story leading up to the application for the writs is told by Professor Channing as follows:

> "'Acts of Parliament restraining colonial navigation and taxing the colonies of the continent for the benefit of the West Indian sugar planters had been on the statute book for years. The Northerners had observed whatever of them they liked and had attended little to the rest, except now and then to bribe an inquisitive governor or an overcurious customs collector. In 1760 Wil-

liam Pitt, finding that the continental colonists were trading with the French and Spanish Islands in the West Indies, cast about for the best means to put a stop to this traffic with the enemy. His advisers told him that if the Sugar Act of 1733 were enforced, this trade must come to an end. This was true because this law provided a prohibitive duty of sixpence per gallon on all molasses brought into the northern colonies, except that which came from British plantations. To enforce the act would deprive the French and Spanish planters of the means of paying for lumber, fish, and flour which they needed for their slaves and for themselves. Thereupon, Pitt ordered the provisions of the act to be enforced to the letter.

" 'The Sugar Act had never been executed for two reasons. In the first place, as soon as it was passed the British sugar planters discovered that what they really wanted was the right to export sugar directly from the islands to continental Europe. Obtaining this favor, they no longer needed the northern American market. In the second place, in the existing conditions of trade, an adequate supply of molasses for distillation into rum was absolutely necessary for the prosperity of New England and the Middle Colonies. Rum was the currency used in the African trade and in the fur trade, and enormous quantities of it were consumed at home and in other English colonies. Not one-quarter enough molasses was produced in the English islands to satisfy the needs of the northern distillers—they must have foreign molasses or go out of business. In the absence of any efficient customs service it was not difficult to evade this law or any other. A false clearance might be obtained at Anguilla, or some other British island, or

collectors, governors, and judges might be bribed by the payment of a small percentage of duty that should have been levied under the act. Even when the officials wished to collect the duty, they found it very difficult to do so where the whole population was against them. Ordinary search warrants were of little use because these were issued only upon information and applied only to certain specified goods in specified places. A writ of assistance was more efficacious because it enabled the holder to search any house or ship, to break down doors, open trunks and boxes, and seize goods at will. In case of opposition, he might call upon the civil authorities for aid. These general writs had been used in England a long time, and a few of them had been issued in the colonies. The announcement that the Sugar Act was to be enforced caused more alarm at Boston than the taking of Fort William had, three years earlier. There was a doubt as to the legality of the existing writs, and the death of the old king put an end to whatever virtue there was in them. The collectors applied for new writs, and the merchants determined to oppose their being granted.'—Channing, 'History of the United States,' Vol. III, pp. 2-3.

"The Virginia Constitution was the first of the state constitutions with a bill of rights. It appeared in 1776 and the tenth section was as follows:

> "'Sec. 10. That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons, not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.'

"This provision obviously merely makes the issuance of general warrants illegal. It is narrower in its terms than the fourteenth article of the Massachusetts constitution which reads as follows:

> "'XIV. Every subject has a right to be secured from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to his right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.'

"In the Virginia Convention of 1788, in which Patrick Henry led the opposition to the ratification of the Federal Constitution, he objected to it because there was no bill of rights and said that without one, 'Excise men may come in multitudes * * * go into your cellars and rooms, and search, and ransack, and measure, everything you eat, drink and wear' (Beveridge 'Marshall,' Vol. I, 440).

"The Fourth Federal Amendment is substantially like that in Massachusetts, though shorter; it reads:

> "'ART. IV. The right to the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no war-

rants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.'

"Now when we consider that these amendments grew out of the movement to *protect* the business of 'smuggling' the ingredients of New England rum, it is not surprising that history should repeat itself to-day under the eighteenth amendment. The Volstead Act to-day is regarded by great numbers of Americans in much the same light as the British trade restrictions and the Stamp Act in the eighteenth century, and 'rum running' to-day is regarded as a reasonably legitimate performance just as the 'molasses running,' with rum as its ultimate objective, was regarded then. It is not a question whether it ought to be so—it may be unfortunate—but it certainly is so and it is a perfectly natural and inevitable incident of such legislation as the Volstead Act. The constitutional protest of the American people against being governed *too much* whether by a king or by legislatures or temporary majorities, contained in the fourth amendment since 1791, raises quite as serious a problem of constitutional interpretation for the courts as does the eighteenth amendment."

F. W. G.